KEE SIAK KOOI & ANOR. v. REGINA

[C. A. (Mathew C.J., Wilson and Buhagiar JJ.) March 7, 1955]

[K. L.—F.M. Criminal Appeal No. 90 of 1954]

Evidence Ordinance, 1950, s. 33—Admission of previous statement of a witness who is not available to give evidence—Proof must be given of circumstances —Emergency Regulations, 1951, reg. 4(1).

In this case the appellants were charged with an offence under reg. 4(1) of the Emergency Regulations, 1951. At the trial the recorded evidence of one Mr. Gray, a prosecution witness in a previous trial of the appellant, on the same offence was admitted under s. 33 of the Evidence Ordinance. This evidence consisted of a confession which the prosecution alleged was made by the appellants to Mr. Gray. On the appeal against their convictions it was argued that the evidence of Mr. Gray was irregularly admitted as the provisions of s. 33 of the Evidence Ordinance were not complied with, there being no evidence to show that Mr. Gray was out of the jurisdiction.

Held: (1) it is established law that before any evidence can be admitted under s. 33 of the Evidence Ordinance, 1950, proof of the circumstances contemplated in that section must be strictly given and as no such proof was given in this case the evidence of Mr. Gray was wrongly admitted; (2) it is not possible to say that the jury in this case would inevitably have come to the same conclusion if their minds were not influenced by the knowledge of the confessions contained in the evidence of Mr. Gray and therefore the convictions must be set aside.

CRIMINAL APPEAL.

K. Chelvanayagam for the appellants.

E. Brown (Federal Counsel) for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by:—

Buhagiar J. : — The appellants were charged with an offence under regulation 4(1) of the Emergency Regulations, 1951. They were tried at Penang Assizes, they were found guilty by the jury, convicted and sentenced to death.

At the trial the recorded evidence of Mr. Gray, a prosecution witness in a previous trial of the appellants on the same offence was admitted under section 33 of the Evidence Ordinance, 1950. This evidence consisted of a confession which the prosecution alleged was made by the appellants to Mr. Gray. Prosecuting Counsel submitted to the Court that Mr. Gray had retired from the Police Force on medical grounds and was then believed to be living in England. A report from Police Headquarters to this effect was tendered and admitted as an Exhibit. The defence objected to putting in of this evidence. In their confession the appellants admitted possession of the firearms but at the trial they stated in their defence that some time before they were ambushed by the Security Forces they had made up their minds to surrender and they did surrender on meeting the Security Forces. No mention of intention to surrender was made in the confession. At the trial they also retracted parts of the statements made to Mr. Gray.

The main ground of appeal is that as the provisions of section 33 of the Evidence Ordinance, 1950 were not complied with, (there being no evidence to show that Mr. Gray was out of the jurisdiction) the evidence of Mr. Gray was irregularly admitted.

It may have been common knowledge to the prosecution and to the defence that Mr. Gray was in fact in England. The report from Police Headquarters would indicate that he was in England. Such record may be a public document within the meaning of section 74(a)(iii) of the Evidence Ordinance, 1950, but no evidence was produced to prove the origin of the document. There was no evidence to enable the Court to decide whether the presence of Mr. Gray could be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considered unreasonable. It is established law that before any evidence can be admitted under section 33 of the Evidence Ordinance, 1950, proof of the circumstance contemplated in that section must be strictly given.

The Deputy Public Prosecutor submitted that apart from the confessions made by the appellants to Mr. Gray there was evidence on which the jury could find that they were in possession of firearms. There may be such evidence but the fact remains that it is impossible to tell what conclusion the jury would have arrived at apart from the confessions. It is not possible to say that the jury would have inevitably, as reasonable men, come to the same conclusion if their minds were not influenced by the knowledge of those confessions. In their confessions the appellants made no mention of intention to surrender while in their defence before the Court they said that they had such intention; they also retracted parts of the statements made to Mr. Gray. One may be suspect of confessions which are supposed to be the offspring of penitence and remorse but it is a frequent occurence in cases like the present, that the repudiation at the trial of a confession or part of a confession, has the effect of strengthening in the minds of the jury the veracity of the confession especially when in the confession the prisoner omits to make reference to an important aspect of his defence.

For the above reasons the appeal must be allowed and the conviction and sentence set aside.

Appeal allowed.